

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2013-392-E
Appellate Case No. 2016-00839

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OCT 03 2016

S.C. SUPREME COURT

Ex Parte: South Carolina Coastal Conservation League, and Southern Alliance for Clean Energy, Petitioners

v.

Duke Energy Carolinas, LLC, South Carolina Office of Regulatory Staff, North Carolina Electric Membership Corporation, South Carolina Department of Health and Environmental Control, and Invenergy Thermal Development, LLC, Respondents.

In Re: Joint Application of Duke Energy Carolinas, LLC and North Carolina Electric Membership Corporation for a Certificate of Environmental Compatibility and Public Convenience and Necessity for the Construction and Operation of a 750MW Combined Cycle Generating Plant Near Anderson, SC.

**RESPONSE OF DUKE ENERGY CAROLINAS, LLC AND THE NORTH
CAROLINA ELECTRIC MEMBERSHIP CORPORATION TO THE
AMICUS CURIAE BRIEF OF SOUTH CAROLINA SMALL BUSINESS
CHAMBER OF COMMERCE**

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October 3, 2016

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I. INTRODUCTION

Pending before this Court is a petition, pursuant to Rule 242 SCACR, for a writ of certiorari to the South Carolina Court of Appeals seeking this Court's review of a decision affirming orders of the South Carolina Public Service Commission ("the Commission") applying the Utility Facility Siting and Environmental Protection Act ("the Siting Act") (codified at S.C. Code §§58-33-10 et seq.). By order dated September 22, 2016 the Court has allowed the Small Business Chamber of Commerce ("SBCC") to submit an amicus brief and required any response to the brief to be filed within ten days. This response is submitted by Respondents Duke Energy Carolinas, LLC ("DEC") and the North Carolina Electric Membership Corporation ("NCEMC").

DEC and NCEMC, along with the Office of Regulatory Staff, have previously filed a return to the petition for writ of certiorari that included a detailed statement of the case and statement of facts, as well as arguments in opposition to the granting of the writ. This memorandum will focus solely on the reasons why the Court should not be persuaded by the arguments advanced in the amicus brief: (1) the Siting Act allows and encourages the participation by parties like the SBCC in the proceeding before the Commission, and SBCC should have made its arguments there; (2) the amicus brief mischaracterizes the Commission's analysis and application of the Siting Act; (3) the Kentucky case relied on in the amicus brief is not persuasive authority for any proposition involved in this case.

ARGUMENT

A. The Siting Act Has Liberal Standing Provisions that Encourage Broad Participation in Proceedings before the Commission and the SBCC Should have Made Its Arguments in That Forum.

In most, if not all, cases in which this Court allows the submission of an amicus brief, the entity submitting it was not, and could not have been, a party to the proceeding giving rise to the appeal, but has a sufficiently strong interest in the outcome of the appeal that its views can be helpful to the Court. That is not the case here. In enacting the Siting Act the General Assembly gave the Commission broad authority to approve the location and construction of major utility facilities and adopted provisions that ensured that all interested persons and stakeholders could participate in the proceedings before the Commission. South Carolina Code Ann. Section 58-33-140 automatically makes parties to any proceeding to approve a major utility facility the following entities: the Department of Health and Environmental Control; the Department of Natural Resources; the Department of Parks, Recreation and Tourism; the Office of Regulatory Staff; and any affected municipality or other government agency that files a petition to intervene. Section 58-33-140 also includes broad language allowing and encouraging participation by other people and entities:

...any domestic nonprofit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health, or other biological values, to preserve historical sites, to promote consumer interest, to represent commercial and industrial groups, or to promote the orderly development of the area in which the facility is to be located; or any other person, if such a person or organization has petitioned the commission for leave to intervene as a party, within thirty days after the date given in the published notice as the date for filing the application, and if the petition has been granted by the commission for good cause shown.

S.C. Code Ann. §58-33-140(1)(d).

The intent of the General Assembly in adopting these provisions mandating participation by various state agencies and local authorities and allowing broad participation by all types of interest groups is made clear from that part of the Siting Act governing judicial review. While S.C. Code §58-33-310 provides that any party to a Siting Act proceeding may seek judicial review, S.C. Code Ann. §58-33-320 precludes collateral attacks on decisions made by the Commission:

Except as expressly set forth in Section 58-33-310, no court of this State shall have jurisdiction to hear or determine any issue, case, or controversy concerning any matter which was or could have been determined in a proceeding before the commission under this chapter or to stop or delay the construction, operation, or maintenance of a major utility facility, except to enforce compliance with this chapter or the provisions of a certificate issued hereunder, and any such action shall be brought only by the Office of Regulatory Staff.

S.C. Code Ann. §58-33-320.

The Siting Act's broad standing provisions and prohibition on collateral attacks taken together show that the intent of the General Assembly was to give the Commission jurisdiction over approval of new major utility facilities and to require any party interested in opposing or supporting such facilities to appear before the Commission. As described in its amicus brief on page 3, the SBCC is a frequent intervenor in matters before the Commission. There is no question that it could have participated in the proceeding before the Commission and made its arguments in that forum. Participation by the SBCC in the contested case proceeding would have given it an opportunity to make its arguments directly to the Commission and would have allowed the Commission and other parties a full opportunity to explore and refute those arguments. Submission by the SBCC of an amicus brief at this late point in the proceedings attacking the Commission's decision is absolutely inconsistent with the language and intent of the Siting Act.

B. The Amicus Brief Mischaracterizes the Analysis and Application of the Siting Act by the Commission.

The SBCC amicus brief correctly cites the provisions of S.C. Code Ann. §58-33-160(1) which sets out the six findings that the Commission must make in order to approve a major utility facility under the Siting Act. The brief then asserts that “[i]n the present case, the PSC focused on one of the enumerated criteria – that the facility will meet a capacity “need” – to the neglect of others.” SBCC Amicus Brief at p. 6. This assertion is completely at odds with the record. In its orders approving the project and in rejecting the petition for rehearing the Commission painstakingly reviewed each of the statutory requirements and the evidence that supported its findings. (R. Vol. I, pp. 9-18; 32-33). The Commission’s findings and the support for those findings were summarized in the Return filed by DEC and NCEMC at pages 9-12. While it is apparent that the SBCC doesn’t agree with the determinations made by the Commission, the record clearly and unequivocally refutes the notion that the Commission neglected to address five of the six findings required by S.C. Code Section 58-33-160(1).


As explained in the DEC/NCEMC Return, the Commission’s findings on the elements of the Siting Act were supported by substantial evidence as required by Lark v. Bi-Lo, Inc. 276 S.C. 130, 276 S.E.2d 304 (1981). The assertions by the SBCC that the Commission didn’t properly weigh the evidence should be disregarded by this Court, especially where the SBCC passed on an opportunity to intervene in the proceeding and present its views directly to the Commission.

C. Kentucky Industrial Utility Customers, Inc. v. Kentucky Public Service Commission, Addresses the Interpretation of Kentucky Statutory Provisions and Has No Relevance to the Issues Presented by the Petition for a Writ of Certiorari.

The SBCC amicus brief cites the recently decided case of Kentucky Industrial Utility Customers v. Kentucky Public Service Commission, 2016 WL 3886312 (Ky. Ct. App. July 15, 2016). That case involved the reconciliation of Kentucky's traditional least cost utility planning statutory provisions with a 2013 enactment that was intended to encourage the development of alternative energy resources. The outcome of the case turned on a close reading of several Kentucky statutory provisions and a determination by the Kentucky Court of Appeals as to what the Kentucky General Assembly intended in passing the various provisions.

The Kentucky case provides no assistance to this Court in considering the Siting Act. Although SBCC in its amicus brief tries to portray this case as one of statutory interpretation, the case is really a substantial evidence case as explained in detail in the DEC/NCEMC Return. The Commission understood and was unpersuaded by the evidence and arguments of Petitioners and made findings and drew conclusions that were amply supported. Accordingly, the Kentucky case sheds no light on the issues presented here.

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CERTIFICATE OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the persons named below a copy of the Response of Duke Energy Carolinas, LLC and The North Carolina Electric Membership Corporation to the Amicus Brief of the South Carolina Small Business Chamber of Commerce in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated this 3rd day of October, 2016.



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